Supreme Court, U.S.
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No. 93-314

In The

Supreme Court of the United States

October Term, 1994

RALPH UNDERWAGER and HOLLIDA WAKEFIELD,

Petitioners,

v.

ANNA SALTER, PATRICIA TOTH, MIMI ROSE, NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE, AMERICAN PROSECUTORS RESEARCH INSTITUTE, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, CHARLES VAUGHAN, and JAMES PETERS, SR.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In a defamation case based on diversity jurisdiction, does the court of appeals' decision pursuant to state law raise an issue appropriate for this Court's discretionary review?

2. As a matter of Wisconsin law, does a public figure plaintiff in a defamation case have the burden of proof of "actual malice?"

3. Does republication of allegedly defamatory matter constitute "actual malice" under Wisconsin law?

THE PARTIES

Petitioners Ralph Underwager and Hollida Wakefield are licensed psychologists and citizens of Minnesota. They have co-authored the books *Accusations of Child Sexual Abuse* and *The Real World of Child Interrogations.*

Respondent Dr. Anna Salter is a citizen of New Hampshire. She is a certified psychologist who treats both child and adult victims of sexual abuse and sexual abuse offenders.

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TO THE HONORABLE SUPREME COURT:

The Respondent, Anna Salter, respectfully requests the Court deny the Petition for Writ of Certiorari submitted by Petitioners, Ralph Underwager and Hollida Wakefield.

JURISDICTION

Petitioners seek certiorari pursuant to 28 U.S.C. § 1254(1) of a decision of the United States Court of Appeals for the Seventh Circuit, which affirmed the district court's decisions on April 25, 1994.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution is involved in this diversity action.

STATEMENT OF THE CASE

It is undisputed that Ralph Underwager has testified in over 220 cases throughout the United States and in Australia, Canada, England, Holland, and New Zealand on behalf of defendants accused of child sexual abuse in both criminal and civil cases. Petitioners have consulted in approximately 200 additional cases concerning child sexual abuse. They have given 30 presentations regarding child sexual abuse in the United States, England, Australia, and New Zealand, and have been interviewed on at

least 15 radio and/or television shows in the United States, Australia, London, Canada, and New Zealand concerning child sexual abuse. Petitioners are prominent proponents of the "leading and suggestive questioning" defense in child sexual abuse cases.

THE MONOGRAPH

Due to her concerns about the increasing use of the "leading and suggestive questioning" defense and discrediting of children's testimony in child sexual abuse cases, Dr. Salter proposed to the New England Association of Child Welfare Commissioners and Directors (New England Association) to develop a bibliography on child sexual abuse interviewing skills, and rebuttal materials to support the testimony of children in child sexual abuse cases. The New England Association is composed of the directors of social service agencies for the states of Maine, Vermont, New Hampshire, Massachusetts, Connecticut, and Rhode Island.

Dr. Salter decided to focus her monograph on the petitioners' book, *Accusations of Child Sexual Abuse*, because it included an extensive bibliography useful to proponents of the "leading and suggestive questioning" defense in child abuse cases, and because petitioners were prominent proponents of that defense.

In May, 1988, the New England Association agreed to fund the study and Dr. Salter began compiling and reviewing over 500 articles which were cited in petitioners' book, *Accusations of Child Sexual Abuse*. She reviewed the original source of the articles cited by the

petitioners before drawing any conclusions. The monograph challenges petitioners' findings in their book *Accusations of Child Sexual Abuse*, and is critical of the "leading and suggestive questioning" defense. Dr. Salter did not doubt the truth of any of her statements in the monograph at the time she authored it and, in fact, she still believes that all of her statements in the monograph are true.

Dr. Salter's monograph, entitled "Accuracy of Expert Testimony in Child Sexual Abuse Cases: A Case Study of Ralph Underwager and Hollida Wakefield," was submitted to the New England Association in January, 1990. The monograph was never traditionally published and has only been formally presented to the New England Association.

Dr. Salter provided the National Center for the Prosecution of Child Abuse (NCPCA) with a copy of her completed monograph in late 1990 or early 1991, for use in its role as a national clearing house and resource center on the investigation and prosecution of child abuse. The NCPCA has made copies of the monograph available to persons upon request at a cost which covers the copying and mailing expenses.

THE "60 MINUTES" TAPE

In the spring of 1990, Dr. Salter was approached by Mike Munro, a reporter for the television program "60 Minutes" of Australia, to be interviewed for a "60 Minutes" of Australia program regarding a child sexual abuse case in Australia known as the "Mr. Bubbles" case. The

defendant in the "Mr. Bubbles" case was accused of sexually abusing children who attended a nursery school run by his wife. He retained Dr. Underwager as one of his expert witnesses to testify at the pretrial hearing. The defendant was not committed for trial.

"60 Minutes" of Australia produced a story on the Mr. Bubbles controversy entitled "Witness for Mr. Bubbles" which concentrated on the testimony of Dr. Underwager. Dr. Salter was one of several persons interviewed for the program concerning her knowledge of Underwager's research and history as an expert witness in child sexual abuse cases. The program was originally broadcast in Australia on August 5, 1990, and includes interviews with Dr. Underwager, Attorney Charles Vaughan, Assistant United States Attorney James Peters, Sr., and Dr. Salter.

On October 31, 1990, a portion of the videotape of the "60 Minutes" of Australia program, "Witness for Mr. Bubbles," was played by Patricia Toth at a workshop at the Midwest Conference on Child Sexual Abuse and Incest in Madison, Wisconsin (Madison Seminar). Her workshop was directed at professionals involved in child abuse intervention and prosecution, including social workers, case workers, prosecutors, physicians, psychologists, and law enforcement personnel. Dr. Salter did not replay the videotape of that program or suggest that the videotape of that program be played at the Madison Seminar.

THE LOWER COURT PROCEEDINGS

Petitioners filed a defamation action against Dr. Salter, and others, on March 19, 1992 in the Western

District of Wisconsin. Petitioners assert that Dr. Salter's monograph and statements she made during the interview for the "60 Minutes" of Australia program defamed them.

On February 1, 1993, Dr. Salter moved for summary judgement. In a memorandum and order dated April 6, 1993, the District Court for the Western District of Wisconsin determined that petitioners were limited purpose public figures, but that there was an issue of fact as to whether Dr. Salter acted with actual malice.

On April 15, 1993 Dr. Salter filed a motion for reconsideration of the court's decision on the grounds that petitioners offered no evidence which demonstrated that a genuine issue existed as to actual malice. By order dated June 4, 1993, the Western District of Wisconsin court granted Dr. Salter's motion to reconsider and motion for summary judgment on the grounds that petitioners had failed to demonstrate clear and convincing evidence of actual malice and that no genuine issue remained for trial.

Petitioners filed a notice of appeal with the United States Court of Appeals for the Seventh Circuit on June 10, 1993. The appeal was argued on December 10, 1993 and the Seventh Circuit rendered a decision on April 25, 1994, affirming the decision of the lower court. Petitioners now seek review from this Court.

ARGUMENT

I. THE WRIT SHOULD NOT BE GRANTED BECAUSE THIS CASE PRESENTS NO ISSUE APPROPRIATE FOR SUPREME COURT REVIEW.

The United States Supreme Court is a court of discretionary jurisdiction. "A petition for writ of certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10.1. Although not inclusive, Rule 10.1 enumerates several considerations authorizing review of a petition.

Under that rule, Supreme Court review is appropriate when a United States court of appeals renders a decision in conflict with another court or has departed from the accepted and usual course of judicial proceedings. Additionally, review is considered when a state court of last resort has decided a federal question in a way that conflicts with another court or when a court has decided an important question of federal law which has not been settled by the United States Supreme Court. *Id.*

A principle purpose for which the United States Supreme Court uses certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. United States*, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991).

No such conflict is present in this case.

Petitioners assert that the rationale of the Seventh Circuit is in direct conflict with Wisconsin law. However, petitioners are in error. The Seventh Circuit's decision is in conformity with Wisconsin law on all points.

Therefore, this case presents no issue appropriate for Supreme Court review and the petition should be denied.

II. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THE WISCONSIN COURTS.

A. Wisconsin Law Applies The Actual Malice Standard To Public Figures.

Petitioners would have the Court believe that the Seventh Circuit's decision violates *Erie Railway Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed.2d 1188 (1983), asserting that it is in direct conflict with the case law precedent of Wisconsin. Petitioners are mistaken. The Seventh Circuit's decision was squarely on point with Wisconsin defamation law. It is noteworthy that petitioners do not argue that the Seventh Circuit erred in determining that they are limited purpose public figures for purposes of their defamation action. Rather, they claim that the court erred in applying the "actual malice" standard to non-media defendants asserting a privilege under Wisconsin common law. Petitioners analysis is flawed in two respects.

First, it is the plaintiff's status, not the defendant's, which determines the burden of proof applied in a defamation case. Second, in this case, the defendant's conduct is not to be examined under common law concepts of express malice, but the actual malice standard applicable to constitutional conditional privileges.

Petitioners erroneously declare that the actual malice standard is inapplicable to this case because the Wisconsin Supreme Court has "clearly asserted" that the *New York Times* standard does not apply to non-media defendants, citing *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141 (1982). In truth, Wisconsin courts have acknowledged that the actual malice standard is applicable to defamation actions by public figure plaintiffs, such as petitioners.

Petitioners seemingly suggest that *Denny, supra*, stands for the proposition that the "actual malice" standard only applies to media defendants. This is incorrect.

In *Denny*, the first question before the court was whether plaintiff was a public figure. *Id.*, at 643. After determining plaintiff was *not* a public figure for purposes of maintaining a defamation action, the court stated:

> We view the Mertz communication to Santry as coming within the standards applicable to private defamation actions. . . . We reaffirm our holding in Calero that *purely private defamations* are not entitled to constitutional protection. . . .

106 Wis. 2d at 660-61, [emphasis added]. Therefore, the court was considering the protection available to a private defendant who defamed a *private* plaintiff about a matter of purely *private* concern. However, the *Denny* court noted that different protections would apply to defendants in defamation actions by public figure plaintiffs about matters of public concern. *Id.* at 643-651.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), this Court held that a

public figure may only recover for a defamation by proving actual malice. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 3008 (1974), the Court expanded the actual malice standard to cover persons who were "limited purpose" public figures.

Similarly, the Wisconsin Supreme Court has agreed that whether a plaintiff is "a 'public figure for all purposes' or a 'public figure for a particular controversy,' " he or she must establish that the defendant acted with actual malice in order to prevail in a defamation action. *Louis v. Coursolle Broadcasting*, 127 Wis. 2d 105, 119, 377 N.W.2d 166 (1985) (citation omitted).

Therefore, petitioners' assertion that Wisconsin law has concluded that the actual malice standard is not applicable to persons other than media defendants is inaccurate.

Second, petitioners claim that the Seventh Circuit applied the wrong standard of proof under Wisconsin common law. It is true that Wisconsin law recognizes that some communications are subject to non-constitutional conditional privileges. *See, Wis.J.I.Civil*, § 2500, at 9.

It is also true that Wisconsin has determined that proof of "express malice" is evidence of abuse of a non-constitutional conditional privilege. *Calero v. Del Chemical Corp.*, 68 Wis.2d 487, 500, 228 N.W.2d 737 (1974). However, the *Calero* court stated:

> The problem of actual malice arises in the cases involving First Amendment protection afforded to the media, such as newspapers, television, and radio, *or comments made about public officers or public figures.*

68 Wis. 2d at 500 [emphasis added]. It was in concluding that the actual malice standard did not apply to purely private defamation communications between private individuals that the *Calero* court applied the express malice test.

Additionally, under Wisconsin law, common law conditional privileges are distinguished from constitutional conditional privileges:

> A constitutional conditional privilege refers to the protection afforded media sources *(and also non-media persons, where the statement involves a matter of public interest or concern)* under the first amendment. . . . Where the plaintiff is a private individual, only negligence by the defendant media source or individual is required to be shown. *Denny v. Mertz, supra.* However, where the plaintiff is a public official or public figure, a higher level of fault must be shown. *In this type of case, the plaintiff must show that the defamatory statement was published with "actual malice," i.e.,* actual knowledge or with reckless disregard of whether the statement was true or false.

Wis.J.I.Civil, § 2500, p. 10-11 [emphasis added].

Further, *Dalton v. Meister,* 52 Wis. 2d 173, 188 N.W.2d 494 (1971) *cert. denied,* 405 U.S. 934, 925 S. Ct. 947 (1972), involved a defamation action brought by an assistant attorney general against a private businessman, not a media defendant. The court, noting that although the case was tried under defamation law concerning "conditional privilege," recognized that it could have been tried under the actual malice standard applicable to public figures. The court stated:

> The *Times/Sullivan* rule *is not confined to news media* and free press, but also applies to *private individuals* and free speech in some cases. *See St. Amant v. Thompson* (1968), 390 U.S. 727, 88 S.Ct. 323, 20 L.Ed.2d 262 . . . . Neither that question nor the burden of proof issue was raised in this case, but we might observe that even a casual reading of this record would lead one to believe as a matter of law that the proof of malice and knowledge of falsity or the reckless disregard of the truth was by clear and convincing evidence.

52 Wis. 2d at 183-184 [emphasis added].

Similarly, in *Polzin v. Helmbrecht*, 54 Wis.2d 578, 196 N.W.2d 685 (1972), the Wisconsin Supreme Court held that a private citizen, acting as a critic of the media, was entitled to the same protections as provided the media in the *New York Times* case, where the matter involved a public concern. In that case, defendant-appellant wrote a personal letter to an editor of the Fond du Lac *Commonwealth Reporter* expressing her opinion that articles concerning a local sewage controversy written by plaintiff-respondent, who was a reporter for the paper, were inaccurate and biased. The court stated:

> Clearly, [defendant] has the same constitutional right to express her opinion as the reporter.
>
> Thus, we concluded that the appellant is entitled to have the protection of the higher level of proof requiring plaintiff to convince the jury by clear and convincing evidence. She is also entitled to a jury determination of whether what was stated was published with "knowledge that it was false or with reckless disregard of whether it was false or not." Thus appellant is

> entitled to the protection of the standards required in the *New York Times* case.

Id., at 586.

The Seventh Circuit accurately noted that no Wisconsin cases involved an action by a public figure plaintiff against a non-media defendant. However, as the Seventh Circuit acknowledged, Wisconsin courts have clearly recognized that the actual malice standard articulated in *New York Times* is applicable to defamation actions brought by public figures against private individuals. Further, petitioners presented no arguments in either lower court suggesting that Wisconsin would impose a lesser burden on a public figure suing a psychologist or prosecutor than on one suing a media defendant. The Seventh Circuit correctly concluded that the "actual malice" standard was the proper burden of proof in this case.

B. The Seventh Circuit Correctly Determined That Republication Of Defamatory Matter Is Not Evidence Of Actual Malice.

Petitioners allege that they submitted ample evidence which demonstrated the existence of actual malice on the part of Dr. Salter. They claim Dr. Salter's deposition testimony that she made copies of the "Mr. Bubbles" tape and sold it to interested persons for $12 a copy is "direct compelling evidence" of actual malice. A review of the actual malice standard is necessary to show why petitioners' "evidence" is insufficient to prove actual malice.

> Actual malice has been defined as knowledge that the statement was false, or reckless disregard as to whether it was false. . . . The focus is

> upon the defendant's attitude pertaining to the truth or falsity of the published statements rather than upon any hatefulness or ill will [citation omitted]. The plaintiff must show "that the defendant, in fact, entertained serious doubts as to the truth of his publication."

Van Straten v. Milwaukee Journal, 151 Wis. 2d 905, 917, 447 N.W.2d 105 (Ct. App. 1989), *cert. denied*, 496 U.S. 929 (1990). "Proof of actual malice, therefore, depends upon the defendant's actual state of mind." *Woods v. Evansville Press Co., Inc.*, 791 F.2d 480, 489 (7th Cir. 1986). In *Harte-Hanks, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989) the court stated:

> The actual malice standard is not satisfied merely through a showing of ill will or "malice" in the ordinary sense of the term. . . . We have made clear that the defendant must have made the false publication with a "high degree of awareness of . . . probably falsity."

Id. at 2685-86 [citation omitted].

Petitioners argue that republication of a defamation demonstrates "ill will" and that "ill will" is evidence of "actual malice." In support of this assertion, petitioners cite the West Virginia Supreme Court decision *Hinerman v. Daily Gazette Co., Inc.*, 423 S.E.2d 560 (W.Va. 1992). However, this case does not support petitioners' position. In *Hinerman, supra*, the court stated:

> The greatest obstacle that a public official libel plaintiff must overcome is the First Amendment requirement that the publisher of a libel against a public official have a *subjective appreciation* at the time of the publication that either (1) the

> defamatory statement is false or (2) the defamatory statement is being published in reckless disregard of whether it is false.

423 S.E.2d at 572.

This case clearly requires that a public figure plaintiff demonstrate that the publisher had a subjective appreciation that statements he or she made were false. Further, in *Van Straten, supra,* the Wisconsin court specifically held that the defendant newspaper's continued publication of allegedly defamatory statements did not constitute "actual malice." 151 Wis. 2d at 917-918. Therefore, under Wisconsin law, republication of defamatory matter is not evidence of "actual malice." The Seventh Circuit correctly found that petitioners did not meet their burden.

Similarly, petitioners' allegation that Dr. Salter's distribution of the "Mr. Bubbles" tape begs the question whether Dr. Salter acted with "actual malice." Petitioners do not specify why Dr. Salter's distribution of the tape to other persons supports a finding of actual malice. That Dr. Salter provided the tape to others does not support the conclusion that Dr. Salter made statements which she knew were untrue or acted with the reckless disregard as to their truth. In fact, if Dr. Salter doubted the veracity of her statements, there would be no point in providing copies of the tape to persons having a legitimate use for that tape.

In support of her motion for summary judgment, Dr. Salter offered evidence demonstrating that *she entertained no doubts as to the truth* of any of her statements in her monograph or on the "60 Minutes" tape. Dr. Salter testified that in preparing her monograph, she spent over 18

months reviewing over 500 articles cited by the petitioners in their book *Accusations of Child Sexual Abuse*. She reviewed each original study or article cited by the petitioners before drawing any conclusions as to each article. Forty-five pages of Dr. Salter's monograph document the facts she relied upon in making her allegedly defamatory statements. In fact, Dr. Salter testified that she still believes every comment she made in the monograph is true.

Second, Dr. Salter testified that every comment she made during the "60 Minutes" interview was made in good faith and that she entertained no doubts as to their truth. She made the statements based on her professional opinion and scholarly conclusions after extensive research and investigation of Dr. Underwager's work, research, court testimony and the relevant professional literature. Dr. Salter still believes that each of those comment are true.

CONCLUSION

The decisions of the Seventh Circuit and the United States District Court for the Western District of Wisconsin are correct. This case merely involves the application of Wisconsin law to a standard defamation claim and is not an appropriate candidate for review by the United States Supreme Court. Thus, this respondent respectfully

requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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